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U.S. Department of Labor

Office of Administrative Law Judges
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CASE NO.: 2000-LHC-2438

OWCP NO.: 6-154839

IN THE MATTER OF:

RUSSELL A. PEFFER

Claimant

v.

INGALLS SHIPBUILDING, INC.

Employer

APPEARANCES:

ROSS DIAMOND, III, ESQ.

For The Claimant

PAUL B. HOWELL, ESQ.

For The Employer

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Russell A. Peffer (Claimant) against Ingalls Shipbuilding, Inc. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on November 30, 2001, in Mobile, Alabama. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered four exhibits, Employer proffered 22 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record. [1]

The parties agreed to argue the case orally at the hearing, therefore no post-hearing briefs were filed. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. Jurisdiction is not a contested issue. At the time of the alleged injury, Claimant was covered by the U.S. Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq., since he was engaged in constructing Naval vessels alongside the navigable waters of the Gulf of Mexico in Pascagoula, Mississippi, at Ingalls Shipbuilding, Inc.

2. That Claimant's injury occurred on July 7, 1993.

3. The injury occurred in the course and scope of employment.

4. That there existed an employee-employer relationship at the time of the accident/injury. (Tr. 23).

5. The date Employer was notified of the accident/injury was July 7, 1993.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; Employer's Exhibits: EX-___; and Joint Exhibit: JX-___.

6. That Employer filed a Notice of Controversion on August 10, 1993.

7. That there was no informal conference held with the District Director.

8. That compensation benefits have been paid to Claimant as follows:

Temporary Total Disability

- August 17, 1993 to October 25, 1993 at $363.70;
- November 11, 1993 to October 27, 1994 at $363.70;
- November 3, 1994 to November 20, 1994 at $363.70;
- July 31, 1996 to August 25, 1996 at $363.70;
- August 15, 1997 to September 17, 1997 at $363.70;
- September 21, 1999 to January 10, 2000 at $363.70;
- July 3, 2000 to November 26, 2000 at $363.70;
- January 16, 2001 to August 5, 2001 at $363.70.

Temporary Partial Disability

- January 11, 2000 to July 2, 2000 at $193.03;
- November 27, 2000 to January 15, 2001 at $218.37;
- August 6, 2001 and continuing at 212.46.

9. That medical benefits for Claimant have been paid to or on behalf of Claimant pursuant to Section 7 of the Act.

10. That Claimant is permanently disabled.

II. ISSUES

The unresolved issues presented by the parties are:

1. Nature and Extent of Claimant’s disability, if any.

2. Claimant’s Average Weekly Wage.

3. Date of maximum medical improvement.

4. Establishment of suitable alternative employment.

5. Attorney's fees and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant, is a resident of Irvington, Alabama which is located about 30 miles outside of Mobile. He is 57 years old with approximately a ninth grade education, however Claimant can read and write and does not have trouble counting. (Tr. 34, 81, 84). After leaving school, Claimant worked on and off shrimping and oystering for close to 20 years. He eventually began doing joint insulation for Frigitemp and at times for Employer. At some point during that time frame he was employed as a captain on an offshore supply boat for L&L Blasting & Painting off the coast of Louisiana. (Tr. 35-37; EX-21, p. 10). While working on ships he learned how to use radar, read a compass and read the blueprints provided by Employer. (Tr. 83-84). Claimant has never obtained a Coast Guard license or taken any written examinations in connection with any of his work on ships. (Tr. 38, 84).

After working as a supply boat captain, Claimant worked for Coastal Insulation, doing insulation and eventually managing their window shop supervising three employees. This job required lifting weight in excess of one hundred pounds on a regular basis. Claimant next worked at a shipyard for James Metal Marine before being employed by Employer on June 30, 1986. (Tr. 39-41).

For Employer, Claimant's duties included insulation, joiner work and working with PCMS tiles, the purpose of which is to absorb radar and distort radar images of Navy ships. (Tr. 42).

Prior to the present claim, Claimant suffered a slip and fall back injury on board one of Employer's ships in which he was taken off of work and received compensation for five or six weeks. This injury did not result in any assigned permanent impairment. Additionally, Claimant sustained a shoulder injury around the same time that lasted approximately

six weeks. No compensation was paid and no permanent damage resulted from the shoulder injury. (Tr. 43).

Claimant did not recall any previous neck injury, however was reminded of an answer to interrogatories regarding a neck injury around 1990. He remembered injuring his neck by bumping his head at worked. Claimant did not recall being off work, but interrogatory answers indicated he was off work for 2 days without compensation. (Tr. 44).

Claimant testified the present claim involves an injury to his neck occurring on July 7, 1993. An escape hatch or trunk weighing 2 to 3 hundred pounds, which someone had fail to lock properly fell on Claimant striking him on the top of his head. (Tr. 45; EX-21, p. 14-15). Claimant was wearing a hard hat at the time and no bleeding or bruising was immediately noted. However, the injury resulted in pain and numbness in his neck and left arm. (Tr. 88; EX-21, p. 16). Employer's doctor, Dr. Warfield, examined Claimant and determined the injury to be a sprain. After getting a second opinion from Dr. Crotwell, an outside orthopedic surgeon at Mobile Orthopedic, Claimant missed work and received compensation for approximately 18 months. (Tr. 46; EX-21, p. 18).

Dr. Crotwell had a myelogram done and discovered a ruptured disc at the C5-6 level. In an attempt to avoid surgery, Dr. Crotwell referred Claimant to Dr. Lee Irvin for pain management and epidural injections. This being unsuccessful, Claimant received a second opinion from a neurosurgeon, Dr. White, that surgery was necessary. On March 10, 1994, before returning to work for Employer, Claimant underwent neck surgery by neurosurgeon Dr. Quindlen. Dr. Quindlen removed a disc from Claimant's neck on March 3, 1994, and informed him his neck would not be 100 percent normal again. (Tr. 47, 89-90).

Dr. Crotwell then released Claimant on September 19, 1994 to return to work for Employer with certain restrictions, to include limited twisting, turning, stooping, bending and no overhead work with a lifting restriction of 40-50 pounds. Upon returning to work, Claimant met with his director, Roy Parker who stated Employer was satisfied with Claimant's work performance and as long as Claimant continued to do his job there would be no further problems. (Tr. 48). Claimant worked overtime hours both before and after his accident.

(Tr. 87). He affirmed he worked "pretty regular" from 1994 until 1999 within his restrictions. (Tr. 90-91).

Claimant returned to work for Employer under his restrictions missing only minor periods of work. Upon his return Claimant worked the same hours with the same job title for the same salary. (EX-21, p. 26).

However, several years later, Dr. Crotwell again took Claimant off of work due to a "flare-up" of his neck and shoulders. Claimant did not recall any new injury or specific incident that caused his condition to worsen. Dr. Crotwell, using a treatment course of medication and physical therapy returned Claimant to work with changed restrictions. (Tr. 49-50; EX-21, 28).

In or around 1999, Claimant was again taken off of work due to pain in his neck, back and shoulders. There was no new incident that occurred which caused his increased level of pain. Dr. Crotwell again changed Claimant's restrictions to no climbing, no ladders, no stairs and no lifting more than 10-15 pounds. (Tr. 50).

His last day of work for Employer was on September 20, 1999. (Tr. 91-92). Claimant met with Employer's representative Melinda Wiley, who informed him they would be unable to put him back to work at that time. About a month later, Ms. Wiley informed Claimant that Employer did not have any jobs for him within his restrictions. (Tr. 51).

Employer's exhibit 15, a document entitled Ingalls Return to Work Program, signed by Mr. Whitney, the director of Claimant's department, was completed on October 25, 1999 which noted Claimant "Cannot work with restrictions." (EX-15, p. 11). Claimant filled out a work request form asking for any position Employer may have available within his restrictions. (Tr. 52). Despite his request for any available position in any department, Claimant has not been offered a position since his meeting with Ms. Wiley. (Tr. 52, 110).

Claimant has since undergone surgery on his left wrist for carpal tunnel performed by Dr. Crotwell. Prior to surgery, in October 1999 an EMG/NCV study was done. (Tr. 92). According to Dr. Crotwell, this surgery, which was paid for by Employer, was related to Claimant's work injury. (Tr. 93). The surgery was an improvement but Claimant still has problems

with numbness and his grip in his left hand. (Tr. 53-54). Claimant did not recall being released at MMI from his carpal tunnel symptoms in October 2000. (Tr. 93).

In March 2000, Claimant underwent another EMG/NCV study regarding problems with his elbow. He was diagnosed with a ulnar or tardy ulnar nerve problem. Dr. Ferrante opined surgery was necessary and Employer paid for the surgery. (Tr. 93-94). Claimant affirmed Dr. Crotwell performed a surgical nerve transfer on Claimant's elbow on March 16, 2001. Claimant stated the surgeries on his left arm have alleviated some of his pain and allowed him some use of his arm, but he still has problems using the arm for any period of time. (Tr. 54-55, 94). Claimant was unsure of the date he was released at MMI from his elbow condition but, on cross-examination, stated it could have been June 26, 2001. (Tr. 94-95).

Claimant has carpal tunnel in his right hand which causes his fingers to go to sleep, but will not have surgery on his right hand unless absolutely necessary. Claimant testified he has difficulty holding things in his left hand before it becomes numb. (Tr. 54-55).

Claimant is presently on numerous medications for both his neck and arm conditions. His neck movement is limited and painful when turning his head from side to side and he cannot look upward. He currently is experiencing numbness in three fingers on his right hand. Claimant described the condition of his left arm to be "messed-up." He complained of lack of feeling, numbness and it feeling cold. (Tr. 61-62).

Claimant is licensed to drive a vehicle, however has had difficulties doing so due to his injuries. He has problems gripping the steering wheel with either of his hands for any distance and cannot back up a vehicle due to his inability to turn and look behind him. He has difficulty turning to see traffic in other lanes. Claimant testified he could not drive more than a few miles safely. He relies on his family to do most of the driving. (Tr. 65-66). He testified he could not drive from his home to Mobile on a regular basis. Claimant has not asked for, nor received any, driving restrictions from his doctor. (Tr. 96).

Claimant stated, he is still on a restricted work status according to Dr. Crotwell. This included a 10 to 15 pound lifting limit, no overhead work, no climbing, no ladders, no

crawling, no stooping, limited twisting, turning and bending. Moreover, Claimant is restricted from using vibrating tools with his hands and performing tasks requiring repetitive movement. (Tr. 67).

Employer's adjuster, F. A. Richard, furnished Claimant with a list of possible alternative employment opportunities prepared by Barry Murphy, a vocational consultant. Additionally, Claimant spoke with Mr. Rick Jones an employee at La Force Shipyard as well as an employee of another shipyard in Coden, both of whom did not feel Claimant would be able to physically perform any of the duties necessary for employment. (Tr. 111-112; EX-21, p. 39). Claimant has not contacted any actual employers on his own, however has followed-up on some, but not all, of the jobs provided by Employer's adjuster with no success. (Tr. 68-69, 95-96).

According to the employers, both of the exterminator positions on the list required some degree of climbing and crawling which Claimant was unable to do. (Tr. 68-69).

Claimant was told one of the security guard jobs had a GED or high school diploma requirement. He was unaware of the educational or physical requirement of the other security jobs on the list. (Tr. 69-70). However, in his deposition, Claimant stated he had refused to fill out an application for the NYCO Security job because of the jobs requirement that he would have to shave his mustache. (EX-21, p. 46).

Blockbuster Video took Claimant's application and told him they would be in touch. Additionally, Claimant filled out an application at Jaguar dry cleaners. The job entailed driving a truck which Claimant explained he could not do, but he filled out the application anyway. (Tr. 70; EX-21, p. 41).

Mr. Sanders, a vocational specialist with Employer, met with Claimant. Mr. Sanders sent him a letter identifying other jobs Claimant should seek and filed a report on January 25, 2001 which Claimant did not receive. (Tr. 113). Claimant could not recall specifically if Dr. Crotwell had him off or on work, but believed he was off work, at the time he received Mr. Sanders' letter. (Tr. 71-72). One of the jobs on the list was a parking lot attendant in downtown Mobile. Claimant testified he would not be able to safely drive from his home to downtown on a daily basis and he would not feel comfortable moving cars with the difficulty he now has driving.

Furthermore, the job description required picking up trash which Claimant would be unable to do if it meant bending and stooping consistently throughout the day. (Tr. 72-74).

Another job on the list was at the Mobile Airport. Claimant testified he was unable to drive safely on a regular basis from his home to the airport. Moreover, this job would require the employee to use a cash register or computer all day. According to Claimant, this would not fall under the prescribed restrictions placed on him by Dr. Crotwell concerning repetitive movement. The job would also entail driving a golf cart throughout the airport which Claimant did not believe he could do adequately. (Tr. 75-76).

A job driving employees around in a shuttle bus was identified by Mr. Sanders for Claimant. However, Claimant believed driving a bus would be more difficult for him to do than driving a car. (Tr. 77-78). Claimant testified if a job was identified he could perform he would be working. (Tr. 115).

Claimant's last visit to Dr. Crotwell was two or three weeks prior to the hearing. At that time Claimant was not made aware of any changes in his work restrictions. Additionally, his medication was not changed, however the prescriptions that were expired were renewed and refills were provided. (Tr. 79-80).

The Medical Evidence

Employer's Infirmary Records

Employer's infirmary records note Claimant suffered a injury on July 7, 1993 when an hatch fell on top of his hard hat "jamming his neck." There seemed to be no direct contact between the hatch and Claimant's head, however, the impact did break Claimant's hard hat. Claimant complained of neck pain. Range of motion tests were performed. Tenderness of the cervical spine was noted but reflexes and grip strength were normal. An x-ray of the cervical spine was taken and no abnormalities discovered. Claimant was given Soma and Ibuprofen for pain.

On July 8, 1993, Claimant was returned to work with certain work restrictions. The restrictions included no overhead work and no lifting over 20 pounds.

On July 13, 1993, Claimant completed a choice of physician form in favor of Dr. Crotwell. (EX-15, p. 1; EX-4). Claimant returned to the infirmary on July 15, 1993 complaining of increased pain moving to his shoulders. The pain was worse on the left but had bilateral trigger points in the "upper trapegine (sic) muscles." (EX-15, p. 2).

From the period of November 3 to November 20, 1994, Employer was unable to place Claimant in an employment position meeting his work restriction requirements. Those requirements included: No lifting greater than 25-30 pounds, no overhead work and limited stooping, bending or twisting. (EX-15, p. 6).

On October 25, 1999, Employer was unable to find a position for Claimant within his current work restrictions. At that time Claimant's restrictions included no climbing ladders or stairs and no lifting more than 15 pounds. (EX-15, p. 11).

On December 3, 1999, Claimant was informed that Employer could not place him in a job satisfying his work limitations which then included no sweeping, no torquing motions of the neck and no lifting over 15 pounds. (EX-15, p. 12).

Again on December 13, 2000, Employer was unable to find a position for Claimant that met his limited work capabilities. Claimant's work restrictions then included no crawling or squatting, no work over chest high, no bending/twisting or torquing, no lifting greater than 10-12 pounds, no repetitive movements, no vibratory actions, and work at the very light to sedentary levels only.

Dr. William Crotwell, III,

On July 16, 1993, Claimant was examined by Dr. Crotwell, his choice of physician, for the first time. (EX-4). He complained of a head and neck injury which resulted from him being struck on the top of the head by a hatch weighing approximately 100 pounds. He was placed on light work by Employer's infirmary, however reported he could no longer handle light duty.

X-rays showed a "straightening of the lumbar spine" with no major fractures or dislocations. Dr. Crotwell put Claimant in a soft collar. Soma and Voltaren were prescribed and

Claimant was taken off-work for ten days and placed in physical therapy before his next evaluation. Dr. Crotwell's diagnosis was a severe cervical strain. (EX-16, p. 1).

Claimant remained off work and visited Dr. Crotwell periodically from August 16, 1993 to November 11, 1993. There was a gradual improvement noted to 80 or 90% on October 22, 1993. (EX-16, p. 5). During this time, Claimant was treated regularly by Cherry Purvis, RPT, with physical therapy and progress was observed. (EX-16, pp. 8-9). Dr. Crotwell opined Claimant reached MMI on October 25, 1993 and he was allowed to return to his regular duties. Dr. Crotwell further opined Claimant had no permanent impairment as a result of his July 7, 1993 work-injury. (EX-16, pp. 11-12).

However, on November 11, 1993, Claimant returned to Dr. Crotwell who found a severe flare-up of Claimant's neck with severe spasms and constricted motion less than 50%. Dr. Crotwell opined Claimant's condition was a recurrent cervical strain. He ordered an MRI, continued Claimant's medication, including Vicodin, prescribed two weeks of physical therapy and took him off work for an additional 2 weeks. (EX-16, p. 5). The MRI performed on November 11, 1993 by Dr. Stephen Munderloh showed a moderately large central disc herniation at the C5-6 level. (EX-16, p. 16).

Claimant was returned to physical therapy where Cherry Purvis instituted a short-term 6 week goal oriented program and a 12 week long-term goal orientated program. (EX-16, p. 13). He received physical therapy regularly from November 16, 1993 to January 10, 1994. Treatment consisted of moist heat, ultrasound, massage and other stimulation. Throughout treatment Claimant complained of an increase in pain radiating to his bilateral upper extremities especially on the left. Marked spasm and a decreased ability to move his shoulders and head were noted. (EX-16, pp. 14-15).

Dr. Crotwell examined Claimant on numerous occasions from November 29, 1993 to January 25, 1994 and finally admitted Claimant to Springhill Memorial Hospital on January 26, 1994 for a thorough work-up. After an examination and consultation with Dr. White, Claimant was diagnosed with Cervical Disc Syndrome and an anterior cervical disketomy was recommended with a referral to Dr. Quindlen to determine if surgery was necessary. (EX-16, pp. 18, 23-24).

Claimant received a cervical epidural steroid injection from Dr. R. Lee Irvin on December 13, 1993, but only had a 20-30 percent improvement. (EX-16, pp. 18-20). He underwent a cervical anterior discectomy by Dr. Quindlen on March 10, 1994, however, Claimant thereafter developed chronic difficulties. (EX-16, p. 25). Dr. Crotwell returned Claimant to work on October 4, 1994 with restrictions of no lifting greater than 20 pounds overhead and 50 pounds below the shoulder. His restrictions were modified to no overhead work and reduced his lifting capacity to 25-30 pounds. Additionally, no excessive twisting, bending, or stooping was allowed. (EX-16, pp. 29-30).

According to Dr. Crotwell, Claimant reached MMI on May 8, 1995. An MRI performed by Dr. Munderloh on March 3, 1995 showed "no recurrent or residual disc" at C5-6 post-surgery. (EX-16, pp. 30-31).

Dr. Crotwell continued to treat Claimant for increased pain in his neck. On May 10, 1996, Claimant's work restrictions were again changed to lower his lifting maximum to 10-15 pounds and precluded climbing or using stairs and no sweeping. (EX-16, p. 36). Claimant was again referred to physical therapy where he experienced pain and spasm. Stiffness and major flare-ups were noted on July 25, 1996, but improvement was indicated on August 22, 1996 when he was released to return to work within his restrictions. (EX-16, pp. 32-35). Nonetheless, Claimant was again removed from work on August 15, 1997 due to his neck pain and spasm and again returned to physical therapy. On August 29, 1997, Claimant showed improvement with therapy, but remained off work with an expected return to work date of September 15, 1997. (EX-16, pp. 51-52).

Periodic treatment by Dr. Crotwell continued until September 21, 1999 when Claimant was again taken off work for an undetermined amount of time. (EX-16, pp. 64-69). On October 11, 1999, Dr. Crotwell found Claimant to be suffering from post-operative degenerative cervical disc disease and bilateral antecubital fossa pain in Claimant's bilateral extremities and a lesion of the spinal cord, probable saryngomyelia. (EX-16, p. 68). The MRI of the cervical spine on October 7, 1999 showed a central cord lesion extending from the lower cervical spine to the mid-thoracic region likely being syringomyelia. (EX-16, pp. 70-71). The MRI of the thoracic spine on October 15, 1999 showed a syrinx of the

thoracic cord from the C7-T1 level to T7, but no evidence of any neoplasm associated with the syrinx. (EX-16, p. 73).

After EMG/NCV tests on Claimant's extremities, Dr. Crotwell concluded Claimant was suffering from bilateral carpal tunnel syndrome which was worse on the left side. (EX-16, pp. 74-79). In a workman's compensation assessment on October 21, 1999, Dr. Crotwell reiterated Claimant's restrictions of 10-15 pounds lifting, no stairs and no climbing and returned him to full work status effective October 25, 1999. (EX-16, p. 80). However, in a similar document dated November 4, 1999, Dr. Crotwell limited Claimant's return to work on October 25, 1999 to light duty and restricted him from doing any sweeping or torquing motions with his neck. (EX-16, p. 81).

On May 26, 2000, Claimant returned to Dr. Crotwell with complaints of his arm and hand tingling and waking him up with numbness. Dr. Crotwell diagnosed carpal tunnel syndrome left. (EX-16, p. 82). Dr. Crotwell opined that Claimant's work injury of July 7, 1993, aggravated his carpal tunnel syndrome from repetitive work. (EX-16, p. 82).

On July 3, 2000, Claimant underwent carpal tunnel release. (EX-16, p. 87). Initially, post-operative examinations were positive, however, on August 25, 2000, Claimant was experiencing a lot of soreness, redness, some swelling and decreased ROM. Dr. Crotwell prescribed Neurontin, began three weeks of therapy and fit him for padded gloves to help him when he returned to work. (EX-16, pp. 87-91). Dr. Crotwell opined that Claimant reached MMI for the carpal tunnel condition as of October 2, 2000 and returned him to work with his previous restrictions. (EX-16, p. 92).

On November 28, 2000, Dr. Charles E. Hall performed EMG/nerve conduction velocity studies on Claimant. He found mild ulnar neuropathy in the upper left extremity with slowing seen distal to the elbow segment but no active axonal involvement. There was mild ulnar neuropathy in the upper right extremity but no neuropathy seen in the elbow segment. Additionally, there was bilateral carpal tunnel with reinnervation graded as moderate on the left and moderate to severe on the right. According to Dr. Hall, there was no radiculopathy or peripheral neuropathy. (EX-16, pp. 94-95).

On December 7, 2000, Dr. Crotwell diagnosed Claimant with tardy ulnar nerve syndrome, however, did not determine surgery would be beneficial. Dr. Crotwell re-defined Claimant's work restrictions to 10-12 weight limit, no lifting over abdominal area, no climbing, bending, twisting, stooping, crawling, repetitive work or vibratory actions. He could perform very light to sedentary work only. (EX-16, pp. 96-98).

On January 16, 2001, Claimant was taken off work for four weeks because of his tardy ulnar nerve syndrome. (EX-16, p. 100). On January 19, 2001, Dr. Crotwell explained Claimant's restrictions and limitations opining that if "job descriptions fit these restrictions . . . then [Claimant] possibly could do these. If it doesn't, then he cannot do it." (EX-16, p. 102). On February 13, 2001, Claimant reported that his left elbow was "bothering him severe with radiation down the arm," with numbness over the fourth and fifth fingers. A cortisone injection was provided and surgery was scheduled for an ulnar nerve transposition. (EX-16, p. 104).

On March 16, 2001, Claimant underwent an anterior translocation of the ulnar nerve deep to the muscle mass and an application of a long arm splint performed by Dr. Crotwell. As part of the post-operative recovery, Claimant was instructed to lift nothing heavier than a fork, pencil or telephone. (EX-16, pp. 107-109).

Claimant received physical therapy, medication and was returned to his regular light duty with the same restrictions on June 25, 2001. According to Dr. Crotwell, Claimant reached MMI on June 26, 2001. On June 27, 2001, Dr. Crotwell, based on AMA guidelines concluded Claimant had a 10% impairment of the upper extremity and a 6% impairment of the person as a whole. (EX-16, pp. 113-117).

Dr. Eugene A. Quindlen

Claimant was first seen by Dr. Quindlen, a neurosurgeon, on February 2, 1994 based on a referral by Dr. Crotwell. He complained of pain in his neck, left shoulder and left arm. After examination, Dr. Quindlen opined Claimant was suffering from a central to left herniated nucleus pulposus at the C5-6 level with distortion of the thecal sac. A cervical discectomy was recommended as being the most effective method of treatment at that time. (EX-17, p. 1).

An anterior cervical discectomy at the C5-6 level was performed by Dr. Quindlen on March 3, 1994. Claimant initially reported improvement post-surgery. Claimant was instructed not to work and only drive short distances. (EX-17, pp. 2-5).

On September 19, 1994, Dr. Quindlen released Claimant at MMI. Claimant had a 5% impairment of the whole body and was restricted from lifting 20 pounds overhead for over 20 minutes and 50 pounds below shoulder level. However, Dr. Quindlen opined Claimant could return to his regular duties as a insulation installer. (EX-17, pp. 6-7).

Dr. Mark Ferrante

At the request of Carrier, Dr. Ferrante, a board-certified neurologist, examined Claimant on January 20, 2001 for a second opinion evaluation. Dr. Ferrante received and discussed the medical records of Ingall's Infirmary, Dr. Crotwell, Dr. Irvin and Dr. Quindlen. (EX-18, pp. 1-4).

Claimant reported no neck pain at rest but attempts to extend, rotate and flex the neck caused pain. He also reported episodic right hand tingling and driving more than 15 minutes causes right hand tingling. (EX-17, p. 3).

After conducting an EMG, Dr. Ferrante opined that Claimant had mild to moderate right carpal tunnel syndrome for which he recommended a neutral splint and over-the-counter medication because Claimant's symptoms were worse on the left and any extensive treatment of the right would leave him with significantly limited hand functions. (EX-18, p. 4).

Dr. Ferrante noted left median neuropathy which is reinnervation as a symptom of carpal tunnel release. Claimant's condition could be reflective of complete or partial recovery which could only be determined by a comparison between pre and post-operative capabilities or a re-evaluation of the nerves after six months. (Id.).

Claimant suffered from a left ulnar nerve irritation with no noticeable neuropathy for which conservative treatment was recommended. However, Dr. Ferrante found Claimant to have symptoms consistent with a cervical whiplash injury including left and right suboccipital neck tenderness and mid-cervical tenderness on the left. Claimant had not yet reached MMI but

Dr. Ferrante felt much of his abilities would return after carpal tunnel release. (EX-18, p. 5).

Finally, Dr. Ferrante found Claimant to have post-traumatic syringomyelia extending from the C7 level to the T7 level of which the most common presenting symptom is pain. No treatment was proscribed at that time, but the condition was determined to possibly be a source of Claimant's pain. (EX-18, p. 6).

The Vocational Evidence

Norman Cowart

Mr. Cowart is a vocational rehabilitation counselor with a graduate degree in psychology and counseling from Ball State University and postgraduate work in vocational rehabilitation. He has been working in the private sector since 1990 and has had his own practice since 1994. Mr. Cowart is a licensed professional counselor in Alabama and a nationally certified rehabilitation counselor. (Tr. 117-118).

On January 19, 2000, Mr. Cowart met with Claimant to gather information from him and examine his records. Claimant's medical difficulties, being out of work and daily activities were discussed. Mr. Cowart used Claimant's age, education and past relevant work history to evaluate Claimant's vocational potential. (Tr. 118-119; See CX-1).

Mr. Cowart discovered Claimant had completed the 8th grade and his relevant work history of the last 15 years was as a joiner/insulator. Fifteen years is the standard time period used in the vocational industry because skills are typically deemed nontransferable after time. Joiner and insulation work is skilled labor and categorized as heavy work. No activities of this type of employment transfer into sedentary or very light employment. (Tr. 120).

Claimant was administered a wide-range achievement test to determine his intellectual abilities regarding letters, words and numbers. According to Mr. Cowart's examination, Claimant could recognize letters and write words from dictation at the 7th grade level. He could count, read numbers, and solve oral problems at the 6th grade level and could recognize and pronounce words out of context at the 5th grade level. (Tr. 121-122; CX-1, pp. 4-5).

Regarding his physical condition, Claimant informed Mr. Cowart he could only sit, stand or walk for less than an hour at a time. During an 8-hour period, he can rotate sitting, standing or walking for about 4 hours. He spends less than one hour a day reclining because of pain. He could occasionally lift up to 10 pounds, but did not feel he could climb, stoop, kneel, crouch, crawl or reach overhead. Claimant claimed to have trouble with fine and gross manipulation with his left hand. He has difficulty with push and pull arm controls, could drive for less than an hour and could not perform repetitive actions with either hand. (Tr. 122).

Mr. Cowart testified Dr. Crotwell's medical records include restrictions on Claimant's employability. However, Mr. Cowart has not reviewed the records of Drs. Quindlen or Ferrante. (Tr. 123, 155-156). According to Dr. Crotwell's reports, Claimant should lift no more than 10 to 12 pounds with nothing over chest level, no bending, squatting, twisting, torquing, crawling or repetitive movement. Claimant should avoid vibratory action and perform only very light to sedentary work. Additionally, a restriction on repetitive motions for his hands and wrists was identified. (Tr. 123; EX-16, p. 97). Repetitive action is defined as more than occasional. It is either frequent or constant; approximately 33 percent of the work day. (Tr. 167).

Mr. Cowart further explained Dr. Crotwell's medical record, specifically a worker's compensation assessment and chart, detailing why some of Claimant's restrictions were necessary. According to the chart note dated January 19, 2001, Claimant was unable to exceed his lifting requirement or perform the restricted activities to avoid severe neck twisting or torquing. Moreover, vibratory tools could adversely affect the ulnar nerve in his hands. On November 7, 2001, Dr. Crotwell developed his most recent chart note which in Mr. Cowart's opinion did not change Claimant's diagnosis or restrictions. (Tr. 125-126).

According to Mr. Cowart's testimony, Claimant's medication could be an obstacle to his finding employment. Claimant is currently taking Neurontin, Celebrex, Parafon Forte and Lortab. Lortab is a narcotic pain medication. Employers requiring a urine test may not employ a person testing positive for Lortab. However, Claimant testified he takes Lortab infrequently and usually at night. (Tr. 126-

129).

In Mr. Cowart's opinion it is unlikely Claimant would be able to find satisfactory employment. Due to his physical restrictions, Claimant is limited to mainly sedentary work which requires the employee to work with his mind. There are few such positions for a person with Claimant's 8th grade educational background. Additionally, those sedentary jobs that may fit into Claimant's physical and educational restrictions typically require repetitive movement of the hands or torquing of the neck. These jobs would include work as administrative support, assemblers, labors, freight and stock material handlers, hand packagers, a driver, production inspector, printing machine operator, messenger, sewing machine operator, a grocery clerk, graders and sorters, slicers and cutters. Mr. Cowart explained these jobs, including a ticket taker in a parking garage, involve the type of hand use proscribed by Claimant's restrictions. (Tr. 131-132). No employer would hire Claimant to drive because of his neck movement limitations. (Tr. 133).

Mr. Cowart examined Mr. Sander's vocational reports and concluded the jobs on the list provided to Claimant would not be suitable employment. Mr. Cowart stated Claimant was physically unable to take a parking attendant job. A job in downtown Mobile would exceed the distance in which Claimant could commute safely each day. Moreover, Claimant would use nearly 40 percent of his income in standard costs for the trip as determined by the government making it economically infeasible. Furthermore, the job in question required the employee to spend approximately 50 percent of each hour on his feet, sweeping and picking up trash which would be beyond the scope of Claimant's capabilities according to Dr. Crotwell's restrictions. (Tr. 133-137).

Regarding the job at the parking garage at Mobile airport, Mr. Cowart did not feel he could ethically recommend Claimant for employment. His decision was based on Claimant's inability to take tickets, exchange money, keep the parking lot clean and drive a golf cart when necessary. (Tr. 138-139).

The other jobs on Mr. Sanders' list were security positions which Mr. Cowart explained that in the Mobile, Alabama locale, employers typically require a GED or high school degree. On cross-examination, he admitted certain

companies such as Swetman and Magnolia may be willing to interview an applicant who does not have a high school equivalence. (Tr. 141, 165). However, their physical requirements were consistent with other guard service companies. Mr. Cowart reviewed the hiring policies of and was aware of employment practices of numerous security companies in the area such as Pinkerton Security and Vinson Guard Services. (See CX-2, pp. 1-2; CX-3, pp. 1-4). He found many of the jobs required standing or driving for much of a 12-hour shift. Additionally, stooping, bending, lifting, squatting or climbing stairs and ladders were often required. (Tr. 140-143). He opined Claimant could not perform the physical tasks required by Pinkerton Security. (Tr. 145).

Mr. Cowart stated he knew of one security company, Eagle Security, which may accommodate an employee with limitations. All of the companies identified were subject to the Americans with Disabilities Act because they employ more than 15 people. Mr. Cowart never took Claimant to Eagle Security or anywhere else in an attempt to obtain employment.

On cross-examination, Mr. Cowart affirmed that exertionally Claimant has the capability of performing less than the full range of light and sedentary categories of work. (Tr. 158; CX-1, p. 5). Claimant can do light work which does not require lifting, such as an assembler position, but because he cannot perform repetitive hand actions he cannot perform any light jobs. (Tr. 159). Mr. Cowart opined Claimant is limited to benevolent or sheltered employment. (Tr. 163).

Mr. Cowart testified motivation was a key factor in obtaining employment, however in his opinion motivation was not the critical factor for Claimant not obtaining suitable employment. In this case, the critical factor in Claimant not looking for work is the strict limitations placed on Claimant by his doctor coupled with Claimant’s limited knowledge of the employment world resulting in a belief that no one would hire him. (Tr. 168-170). Further, considering his education, age and physical restrictions, Mr. Cowart could not think of any job opportunities for which he could ethically recommend Claimant. (Tr. 171).

Joe H. Walker, C.R.C.

Mr. Walker was appointed by the U.S. Department of labor to assist in the process of returning Claimant to re-employment with Employer. (EX-19, p. 1).

According to Mr. Walker's report dated November 25, 1994, Claimant was released to return to work on October 4, 1994 and had been receiving workers' compensation benefits in the amount of $363.70 per week since his injury on July 7, 1993. Claimant had been accepted by Employer's Return to Work Committee and was expected back at work on October 27, 1994. On that date, Claimant fulfilled the necessary requirements to begin work and actually performed his restricted duties on October 28, 1994. (EX-19, p. 4).

On November 1, 1994, Claimant reported the department of personnel had satisfactorily worked with him on his restrictions and he could adequately perform his new duties. Mr. Walker met with Claimant's supervisor to explain Claimant's limitations. He was assured all work assignments would fit Claimant's capabilities. Mr. Walker also met with Claimant and discovered Claimant's work experience over the past 2 days did fall within his restrictions. (EX-19, pp. 5-6).

After working on November 1 and 2, 1994, Claimant reported symptoms to his supervisor and clocked out early on November 2, 1994 because he could not "put his tools up." On November 4, 1994, Mr. Walker contacted Claimant to discuss Dr. Crotwell's examination the previous day. According to Claimant, Dr. Crotwell had modified his restrictions. Claimant had passed those new restrictions on to Ms. Melinda Wiley, Work Restriction Coordinator for Employer to be reviewed by the department of personnel. Any return to work was contingent on a determination that suitable alternative employment was available. (EX-19, pp. 7-8).

On November 10, 1994, Claimant's supplemental work restrictions were received and reviewed by the Return to Work Committee and the paint department personnel. Claimant was placed on a leave of absence and his benefits reinstated pending a review of possible placement consistent with his revised work restrictions. (EX-19, p. 9).

Claimant was re-instated by Employer and returned to work under his new restrictions on November 21, 1994. Mr. Walker met with Claimant's supervisor who was familiar with Claimant's new restrictions. Claimant complained of symptoms occurring later in the shift the night before and difficulties performing the "light, limited activity" he was asked to do. Employer's supervisor reiterated his willingness to work with Claimant within his restrictions. (EX-19, pp. 9-11).

On November 28, 1994, Mr. Walker was informed by Ms. Wiley that Claimant was experiencing discomfort to the degree he felt it would be unlikely he could work an 8-hour shift. Claimant took vacation days on December 1 and 2, 1994, but returned to work on the following Monday with no complaints. Claimant's work was described by his supervisor as "doing the best that he could." Mr. Walker received no further complaints regarding Claimant's effort or attendance and Claimant made no complaints concerning his work assignments or wages through December 14, 1994. (EX-19, pp. 13-15). Claimant was examined by Dr. Crotwell on December 15, 1994, but no changes in his work status or restrictions occurred.

Tommy Sanders, C.R.C.

Mr. Sanders is a certified rehabilitation counselor with a B.A. and a Master's degree from Mississippi State University. (EX-20, p. 1). On November 13, 2000, at Employer's request, Mr. Sanders interviewed Claimant to determine his employability. According to Mr. Sanders, Claimant was cooperative and showed interest in obtaining work within his restrictions. (EX-20, p. 3).

Claimant reported he had completed the 9th grade and was capable of basic literary skills such as filling out job applications and a written drivers test. Claimant's work history consisted of a commercial fisherman off and on for 30 years, a pipe-fitter and a joiner/insulator. Additionally, Claimant had served as a supply boat captain with a crew of up to 10 men for approximately a year. This job required using a compass, radar and navigational charts and paid up to $120.00 a day. (EX-20, p. 4).

Claimant began his last tenure of employment with Employer in 1986 and the last day he recalled working was in September 1999. His job title was joiner/insulator earning approximately $14.00 per hour. (Id.).

Mr. Sanders reviewed Claimant's medical records dating back to 1983 and discussed Claimant's medical history with him. Both Claimant and Mr. Sanders felt confident Claimant could return to work within the latest set of restrictions assigned by Claimant's treating physician, Dr. Crotwell. (EX-20, pp. 4-5).

However, Claimant complained of pain in his left wrist and forearm as well as problems with grasping. He further noted numbness in his right hand when grasping a steering wheel for 10-15 minutes. Additionally, Claimant reported experiencing pain in his lower back and right hip when bending. Claimant is taking medication for his symptoms, but was unaware of any side-effects the medications may cause.

Claimant's work experience was categorized as light to heavy physical activity within unskilled to skilled classifications. He is capable of supervising the work of others, keeping records, blueprint reading and working to precise measurements. Mr. Sanders opined with his current restrictions, Claimant could not perform his previous duties for Employer. However, Mr. Sanders further opined due to Claimant's basic academic skills and ability to perform light to sedentary work, it would be possible for Claimant to qualify for and retain employment at entry level unskilled and lower level semi-skilled jobs. (EX-20, p. 5).

A labor market survey was conducted in the week of November 27, 2000, in which certain possible employers in the Mobile area were canvassed. Mr. Sanders identified the following job openings:

Maxx Oil was accepting applications for a fuel booth attendant for the 3-11 p.m. shift. This was a full-time position requiring either a high school education or reading and writing skills and paying $5.60 an hour to start. The employee would primarily work inside a booth operating a cash register, take payments, make change and complete a shift report. There would be some sweeping and emptying of trash in the booth, however the employee would have the opportunity to alternate between standing and sitting most of the shift. There would be occasional lifting of 5 pounds and occasional pushing or pulling of 2 pounds, occasional standing/walking with frequent sitting/standing.

Apcoa Parking was hiring for full and part-time airport parking lot attendants at $5.50 per hour. The duties were similar to the Maxx Oil opportunity, however, required the employee to be available to work any shift either day or night. Additionally, the job called for the employee to drive passengers to and from the airport on a golf cart.

Republic Parking had 2 openings for full-time booth attendants starting at $5.25 an hour. In addition to issuing parking tags and collecting money, the job required picking up trash around the parking lot and may include parking vehicles depending on the location. (EX-20, pp. 5-6).

Mr. Sanders compiled a retroactive labor market survey regarding jobs available on or about October 2, 2000. He found Vinson's Security hired 8 new security guards during October at $5.15 per hour. NYCO Security hired 3-4 employees during October at $5.75 per hour an Apcoa hired 3 people during October at $5.50 per hour. (EX-20, p. 6).

Mr. Sanders was again contacted on January 18, 2001, to conduct a hypothetical labor market survey to determine the availability of employment for Claimant as of January 2000. Prospective employers were asked to consider Claimant's age, education, prior work history and medical restrictions at that time. The restrictions included no lifting over 10 to 15 pounds, no sweeping and no torquing motions of the neck.

Pinkerton's Security advised it had an opening for full-time work in Theodore, Alabama starting at $5.25 per hour. The job entailed working out of a gate and making 15 to 20 minute rounds each hour. A good faith effort to obtain a GED was a requirement for employment at Pinkerton's.

NYCO Security identified a full-time job during January 2000, starting at $5.30 per hour. The job required good public relations skills, lifting was negligible with frequent sitting and occasional standing/walking. (EX-20, p. 8).

In late January 2000, American Citadel was accepting applications for a full-time gate guard position starting at $7.00 per hour in Moss Point, Mississippi. The job at times could include walking up to five miles per day, required maintenance of a log book and completion of accident reports when necessary. The employee could alternate sitting, standing and walking with lifting ranging from three to five

pounds. (EX-20, p. 9).

On August 1, 2001, Mr. Sanders created a follow-up hypothetical labor market survey regarding Claimant. Taken into account was Dr. Crotwell's latest opinions concerning Claimant's physical condition. Dr. Crotwell assigned Claimant a 10% impairment to the upper extremity which translates to a 6% impairment of the entire person. Claimant's medication of Lortab and Celebrex were continued but physical therapy was terminated and a lifting restriction of 10 to 15 pounds, no sweeping and no torquing motions of the neck were implemented. (EX-20, p. 10).

Swetman Security was accepting applications for two to four full-time gate guards with entry level wages of $5.78 per hour. The job entailed checking delivery and visitor's credentials and maintaining a log book. Additionally, there would be limited walking of 10 to 15 feet, occasional lifting of two pounds and an ability to alternate sitting, standing and walking.

NYCO Security was accepting applications for two 32-40 hour per week bus drivers starting at $7.11 per hour. Duties included driving guests and employees around on company property. The employee would be driving for approximately six and one-half hours a day and would also perform gate guard duties. Additionally, the employee would be responsible for reporting the condition of the bus and may be required to check oil, gas and tire pressure.

Apcoa Parking had one parking lot attendant/cashier position for 20 to 30 hours a week at $5.50 per hour. In addition to the normal booth duties, such as using a computer keyboard, accepting payments and making change, this job included transporting passengers around in a golf cart, occasional lifting of two pounds and alternating sitting, standing and walking. (EX-20, p. 11).

Regarding jobs available on or about June 26, 2001, Magnolia Security sought to hire one full-time security guard at an entry salary of $5.50 per hour. Apcoa had hired 4 people since June 6, 2001; and Coastal Energy was accepting applications for full and part-time fuel booth cashiers in Jackson County, Mississippi at $6.15 per hour.

Mr. Sanders opined Claimant was capable of performing all of the jobs listed above and the job opportunities conformed to the restrictions provided by Dr. Crotwell. (EX-20, pp. 11-12).

A follow-up labor market survey dated November 9, 2001 identified the following job opportunities:

On October 24, 2001, Supreme Security in Mobile, Alabama, was accepting applications for one 35-40 hour per week security guard with entry wages of $5.50 per hour. The job entailed checking customer's bags and receipts as they left a department store. Walking throughout the store may be required occasionally and days and hours of work may vary. Lifting was negligible with occasional sitting/handling and frequent standing/walking. No torquing of the neck or sweeping was required. (EX-20, p. 16).

On October 23, 2001, Republic Parking noted they had hired someone on September 7, 2001 at $5.25 per hour for the job previously discussed above.

Swetman Security indicated it was hiring two full-time gate guards at $5.78 per hour. The job was at an industrial site logging visitors and deliveries in and out. Flexibility as to shift availability was necessary. There was occasional two-pound lifting, frequent sitting and occasional standing and walking.

Finally, on October 16, 2001, Magnolia Security was accepting applications for six part and full-time positions ranging from $5.50 to $5.75 an hour. Jobs vary from site to site and included either foot patrol, vehicle patrol, gate patrol or some combination of foot and gate patrol. A police background check and drug screening were required and the employee must be available to work any shift. (EX-20, p. 17).

The Contentions of the Parties

Claimant contends he has been unable to work at any occupation since September 21, 1999 due to increasing difficulties with his injured neck and carpal tunnel syndrome. Claimant's doctor took him off work and has only agreed to return him to work status under limited conditions. Despite Claimant's willingness to return to work for Employer, Employer has not satisfactorily supplied adequate employment

opportunities for Claimant that conform to his doctor's restrictions, including security guard positions employed at the yard.

Claimant's physical restrictions limit him to jobs categorized as very light or sedentary. This, in conjunction with Claimant's age and limited educational background, make finding outside suitable alternative employment difficult. Claimant asserts light jobs are eliminated because they require repetitive motion such as operating a cash register or computer terminal.

Claimant avers job opportunities available to him include tasks which fall outside his restrictions such as repetitive motion, operating a cash register/computer, and ticket taking. Other jobs, such as security work or parking lot attendant, would not be satisfactory due to the educational requirements some companies have as well as the physical requirements Claimant would be unable to meet.

Additionally, Claimant contends he is currently on numerous medications which effect his mental awareness and physical ability. Claimant is not capable of performing any job except perhaps for sheltered employment from a benevolent employer which under the statute he is not required to locate. Therefore, Claimant is permanently totally disabled.

Claimant asserts his date of MMI is September 21, 1994 according to his treating physician's records and he has only gotten worse since that date. Therefore, his benefits in terms of cost of living adjustments and just compensation should be calculated from that date. Additionally, the benefits received by Claimant as temporary total should be converted to permanently total for the proper time periods.

As for average weekly wage, Claimant asserts the best way for it to be calculated is by dividing his annually income by 52 weeks in a year and not employ the Section 10(a) formula used by Employer.

Employer contends case law clearly permits Employer to determine average weekly wage in the way it has been calculated and it should therefore stand at $545.55. Furthermore, it is Employer's contention Claimant has undergone two additional surgeries after the date of his MMI from his first neck surgery. Both subsequent surgeries were

approved by Employer and Claimant has reached MMI for both. Therefore, Claimant's true MMI date should be regarded as June 26, 2001, the date from which he was released from his last surgery and not the MMI date for the first surgery Claimant underwent.

Employer argues Claimant's restrictions as of November, 2000 no longer include some of the more restricted limitations such as repetitive activities which indicates an improvement in his condition and achievement of MMI. Additionally, under these new lower restrictions, suitable alternative employment has clearly been demonstrated. However, even under his old restrictions Claimant could adequately perform the duties of several of the job openings provided to Claimant by Employer.

Employer bases its opinion on the reports of its vocational experts and Claimant's failure to diligently pursue employment from the identified employers.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Nature and Extent of Claimant's Disability

The parties stipulated, and I find, that Claimant suffered an injury on July 7, 1993, within the course and scope of his employment with Employer. Therefore, I find and conclude that Claimant has sustained a compensable injury under the Act. However, the burden of proving the nature and extent of his disability rests with Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). Trask, 17 BRBS at 60. Any disability suffered by Claimant before reaching MMI is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once the claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

B. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of MMI. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of MMI is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Ltd., 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and MMI will be treated concurrently for purposes of explication.

In light of the testimonial and medical evidence of record, I find Claimant was temporarily and totally disabled from the date of injury, July 7, 1993 to May 8, 1995[2], the

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[2] Dr. Crotwell originally determined October 25, 1993 to be Claimant's date of MMI with regards to his neck injury. He returned Claimant to his regular duties which he could not perform and opined Claimant had no permanent impairment. However, due to obvious subsequent decline in Claimant's

date he reached MMI with regard to his neck injury.

From the date of MMI on, any loss of earning's suffered by Claimant with regard to his neck injury must be considered to be a permanent disability. Dr. Crotwell opined during the time Claimant was taken off work due to his neck condition he could clearly not perform his regular duties. Therefore, under the Act, Claimant was totally disabled. For the periods Claimant was off work from the date of his injury, July 7, 1993 to the date of MMI, May 8, 1995, Claimant was entitled to compensation for a temporary total disability. These dates are set out in the parties' stipulations and were not contested at the hearing. (JX-1). Any time Claimant was taken off work during these dates must be considered a result of Claimant's work injury to his neck. Since Claimant had already reached MMI for his neck injury he would be entitled to compensation for permanent total disability in the absence of a showing of suitable alternative employment.

Claimant was first diagnosed regarding his other symptoms, such as bilateral antecubital fossa pain and carpal tunnel syndrome, on October 11, 1999. Claimant asserts these conditions are a direct result of or were aggravated by his work injury on July 7, 1993. Employer has offered no evidence, medical or otherwise, to contradict this assertion. I find these symptoms to be separate, although work-related, injuries.

On October 11, 1999, new injuries were diagnosed. According to his physician, Claimant reached MMI with regards to his carpal tunnel syndrome on October 2, 2000. Therefore, for the time Claimant was off work from October 11, 1999 to October 2, 2000 Claimant continued to be permanently, rather than temporarily, totally disabled. Subsequently, Claimant underwent an anterior translocation on March 16, 2001, from which he reached MMI on June 26, 2001. Although Claimant's ailment was temporary in nature from November 28, 2000 to June 26, 2001, he is entitled to permanent total disability benefits for this time period as a result of his concurrent permanent neck disability.

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condition and the need for surgery, I find the date of MMI for Claimant's neck injury to be May 8, 1995 when Dr. Crotwell released Claimant at MMI following his neck surgery.

Thereafter, additional MMI dates associated with the carpal tunnel release and anterior translocation resulted from separate, but related aggravations stemming from Claimant's work injury. Although Claimant thereafter underwent ongoing attempts to alleviate neck pain, to include medication, such treatment is entirely consistent with and even indicative of permanent disability. Such a finding alone entitles Claimant to permanent total disability benefits notwithstanding that his additional carpal tunnel syndrome and elbow disabilities were only temporary in nature during a concurrent period of time. It is totally illogical and incongruous to deny permanent disability benefits and Section 10(f) adjustments for Claimant's neck injury simply because he has other ailments that are simultaneously temporary in nature. A subsequent MMI date for such ailments does not change the character of the permanent disability resulting from his previous neck injury. I so find and conclude.

B. Suitable Alternative Employment

If the claimant is successful in establishing a prima facie case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Turner, Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992). However, the

employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane, 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy the employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane, 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991). In so concluding, the Board adopted the rationale expressed by the Second Circuit in Palumbo v. Director, OWCP, 937 F.2d 70, 76 (2d Cir. 1991), that MMI "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis." The Court further stated that ". . . It is the worker's inability to earn wages and the absence of alternative work that renders him totally disabled, not merely the degree of physical impairment." Id.

In the present matter, Employer relies on the labor market surveys/reports of Mr. Sanders and the list of jobs

provided by Employer to establish suitable alternative. Claimant proffers his own testimony and the testimony of Mr. Cowart in rebuttal.

Although Claimant did not apply for all the jobs on the list provided to him by Employer's adjuster, which list was not made a part of the record, Claimant did make an attempt to secure some of the jobs on the list without success. (EX-21, pp. 39-46). Employer's reliance on the list of job opportunities provided to Claimant is inadequate. The job openings identified fail to document the physical or mental requirements and/or functional demands of the work to be performed. As noted above, the precise nature and details of the job opportunities must be established to allow a rational determination of its suitability and realistic availability. Accordingly, I reject the list of jobs provided by Employer's adjuster as not being suitable alternative employment.

Of the jobs identified by Mr. Sanders' November 27, 2000, labor market survey, I find the fuel-booth attendant position at Maxx Oil to be inappropriate because of the educational requirement of having a high school education. Although Mr. Sanders' report notes a person with adequate reading and writing skills may still qualify for the position, it has not been made clear that Claimant's education and mental capabilities would rise to a level sufficient to satisfy this requirement.

The job as a parking lot attendant at the airport for Apcoa Parking is not satisfactory because it would require Claimant to drive passengers to and from the lot on a golf cart. According to Claimant's own credible testimony and evidence included in the medical records of Dr. Crotwell regarding limited range of motion in his neck and difficulties operating vibratory machines, I find Claimant unable to operate a motor vehicle on a regular basis. Another demand of this job is operating a cash register and making change which would constitute repetitive movements precluded by Claimant's restrictions.

Likewise, the job openings at Republic Parking for a booth attendant would require moving automobiles and are therefore inappropriate. Making change, taking tickets and operating a cash register would fall under the repetitive movements precluded by Claimant's restrictions. Further, these jobs often required picking up trash around the lot to

include activities such as sweeping, stooping or bending which are limited by Claimant's restrictions.

Mr. Sanders' hypothetical labor market survey dated January 25, 2001, for jobs available in January 2000, considered Claimant's restrictions as no lifting over 10 to 15 pounds, no sweeping and no torquing motions of the neck. These jobs are considered below:

The position found by Mr. Sanders for a gate guard at Pinkerton Security in Theodore, Alabama is inadequate. It has not been made clear by the record the distance Claimant would have to commute daily for work in Theodore, Alabama. However, as stated above, due to his physical restrictions, I conclude it would be impractical for Claimant to drive any significant distance to and from work on a daily, sustained basis. Furthermore, according to Mr. Sanders' report, employment with Pinkerton Security is contingent upon a "good faith effort" to obtain a GED. Such a standard is ambiguous at best, and given Claimant's limited educational background it cannot be determined whether he would satisfy the requirement and thus be competitive for such employment.

The NYCO guard position at the hospital emergency room requiring 40+ hours of work per week could only be deemed acceptable if the daily commute to Mobile, Alabama, would be within Claimant's driving capabilities. I find that on a sustained basis, Claimant could not commute daily to Mobile from his residence. Therefore, I find this job is not suitable for Claimant.

The job with American Citadel is not appropriate for Claimant. According to Mr. Cowart, Claimant reported an inability to stand or walk for more than an hour at a time. This position, at times, would require walking for up to five miles a day. Additionally, Claimant would be responsible for filling out accident reports which may exceed his mental capacities.

On August 1, 2001, Mr. Sanders issued a follow-up hypothetical labor market survey using the previous restrictions. Available jobs at Swetman Security and Magnolia Security were listed.

Mr. Cowart opined Magnolia Security would consider hiring an employee who did not have a high school education.

However, the job identified by Mr. Sanders, depending on the site Claimant may be employed, required him to drive a company vehicle. Mr. Cowart opined he could not ethically recommend, nor would an employer hire, Claimant for a position which included operating a vehicle due to his physical restrictions. Magnolia also requires its employees to pass a drug screening test which may be difficult for Claimant due to his current medication.

Swetman Security is another company Mr. Cowart indicated may be willing to accept an application from Claimant even though he does not have a high school education. However, it is not clear what the requirements for such special consideration would be. Moreover, it is necessary to know just how many of these exceptions are made and the number of competing applicants for such a position before this job could be considered suitable alternative employment. The Magnolia and Swetman jobs, which allow special consideration of an applicant who does not otherwise meet the employer's educational requirements, may be sheltered or benevolent employment which is not interchangeable with suitable alternative employment under the Act.

The Apcoa job at the Mobile Airport was previously considered above and found to be unsuitable for Claimant.

I find the bus driver position at NYCO Security to be inconsistent with Claimant's physical restrictions. This job entails driving a passenger bus in excess of six hours a day. As previously mentioned, due to Claimant's limited range of motion in his neck and inability to operate vibratory machinery, it is not suitable for Claimant to drive a motor vehicle for any significant period of time. Additionally, the duties of this position would include checking the condition of the bus such as tire pressure, oil and other levels. These activities would also include bending, stooping and torquing of the neck prohibited by Claimant's restrictions.

Finally, Supreme Security was accepting applications for a security guard job on October 24, 2001, in Mobile, Alabama, which I find is not suitable for Claimant because as previously discussed, due to his physical restrictions and limitations, Claimant cannot drive the distance from his residence to Mobile on a daily, sustained basis.

The additional jobs listed by Mr. Sanders in his November 9, 2001, hypothetical labor market survey involving Republic Parking in Mobile, Alabama, Swetman Security and Magnolia Security have previously been considered above and found to be unsuitable for Claimant for the reasons expressed.

I find and conclude that none of the jobs identified by Employer's vocational expert satisfy the physical, mental and geographical restrictions necessary for Claimant to realistically compete and obtain employment. I, therefore, find no suitable alternative employment has been established and Claimant is entitled to permanent total disability benefits from his date of MMI, May 8, 1995, and continuing thereafter.

C. Average Weekly Wage (AWW)

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra., at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can[] reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821 (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

In this case, Claimant alleges Employer wrongfully calculated his average weekly wage. According to the Claimant, because he earned $29,429.33 working approximately five days week in the year prior to his injury, the AWW should be computed by dividing his earnings by 52 weeks in a year, resulting in an AWW of $565.95.

However, as stated above the Act clearly states which methods are appropriate for establishing AWW. When the claimant, as here, has worked for Employer in the same employment for "substantially the whole of the year" prior to the injury, average annual wage should be assessed by using the formula in Section 10(a) of the Act.

Reviewing Claimant's payroll and earnings records with Employer from July 12, 1992 through July 4, 1993, (EX-5), Claimant was paid for 1,871.9 regular hours, 150.6 time and one-half hours, 55.2 double time hours and 80 vacation hours for a total of 2,157.7 hours over the course of 52 weeks, which when divided by an eight hour work day, yields a total of 269.7 days worked. (2,157.7 ÷ 8 = 269.7). Claimant earned $29,429.33 during the above period, resulting in an average daily wage of $109.12 ($29,429.33 ÷ 269.7 = 109.12). Since Claimant was a five-day per week worker, his daily wage should be multiplied by 260, as set forth in Section 10(a), yielding an average annual wage of $28,371.20. Pursuant to Section 10(d) of the Act, Claimant's average annual wage of $28,371.20 should be divided by 52 to conclude that Claimant's average weekly wage is $545.60. See Diosado v. Newpark Shipbuilding & Repair Incorporated, 31 BRBS 70, 75 (1997).

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10 percent penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d). Penalties were not raised as an issue in this matter.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[3] A service sheet showing

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[3] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge should compensate only the hours spent between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal

that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for temporary and total disability from August 17, 1993 to October 25, 1993, from November 11, 1993 to October 27, 1994 and from November 4, 1994 to November 20, 1994, based on Claimant's average weekly wage of $545.60, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer shall pay Claimant compensation for permanent and total disability from July 31, 1996 to August 25, 1996, from August 15, 1997 to September 17, 1997 and from September 21, 1999 to present and continuing, based on Claimant's average weekly wage of $545.60, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's July 7, 1993 work injury, and its residuals established in October 1999, pursuant to the provisions of Section 7 of the Act.

4. Employer shall receive credit for all compensation heretofore paid, as and when paid.

5. Commencing October 1, 1995, Employer shall pay annual cost of living increases to Claimant in accordance with 33 U.S.C. § 910(f). The specific dollar amounts shall be computed by the District Director.

6. Employer shall pay interest on any sums determined to

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proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 823 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for hours earned before the undersigned after **June 8, 2000**, the date the matter was referred from the District Director.

be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 15th day of April, 2002, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge